APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT DATED AUGUST 30, 2001

SUPREME COURT, APPELLATE DIVISION,
THIRD DEPARTMENT, NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

DANIEL RUBIN,

Appellant.

Aug. 30, 2001.

* * *

Before: CARDONA, P.J., MERCURE, CREW III, PETERS and MUGGLIN, JJ.

CREW III, J.

Appeal from a judgment of the Supreme Court (Czajka, J.), rendered May 14, 1999 in Albany County, upon a verdict convicting defendant of the crimes of grand larceny in the second degree and offering a false instrument for filing in the first degree (eight counts).

When this matter was last before us, we held that counts one through seven of the indictment must be dismissed inasmuch as the Medicaid regulation serving as the basis for the fraud alleged in those counts was unconstitutionally vague (271 A.D.2d 759, 706 N.Y.S.2d 225). Upon appeal, the Court of Appeals modified our order by reinstating counts one

through seven of the indictment and remitted the matter to this Court for consideration of the facts and issues raised but not determined on the prior appeal (271 A.D.2d 759, 706 N.Y.S.2d 225).

Initially, we disagree with defendant's contention that all issues raised on the prior appeal, except those as to counts eight and nine, must now be addressed by this Court. As noted in our prior decision, defendant's remaining contentions were determined to be either academic or without merit. What was not academic was the issue of the legal sufficiency of the evidence regarding the dismissed counts and defendant's claim that counts one, two and three must be reversed because the certificates underlying those counts of the indictment did not contain the specific language: "I have reviewed these claims: I (or the entity) have furnished or caused to be furnished the care, services and supplies itemized and done so in accordance with applicable federal and state laws and regulations." With regard to the latter contention, suffice it to note that this issue is not preserved for appellate review inasmuch as it was not raised at the time of trial (*see, People v. Gray*, 86 N.Y.2d 10, 20-21, 629 N.Y.S.2d 173, 652 N.E.2d 919). Moreover, the cited language was not an essential predicate to defendant's conviction of either grand larceny in the second degree or offering a false instrument for filing in the first degree. If the jury concluded, as it undoubtedly did, that defendant submitted claims that were fraudulently inflated, the jury was justified in concluding that he obtained property "by fraudulently inducing the owner to part with both possession and title through the use of false statements" (*People v. Norman*, 85 N.Y.2d 609, 618, 627 N.Y.S.2d 302, 650 N.E.2d 1303) and that he offered the instrument knowing that it contained false information with intent to defraud (*see*, Penal Law § 175.35).

Appendix A

The record reflects that there is a regulation providing that it is improper to bill Medicaid at a higher rate than that charged to the general public (*see*, 18 NYCRR 505.14[h][7][ii][a][1][i]). Various witnesses testified that defendant was aware of that regulation and that he nevertheless submitted certifications requesting reimbursement for personal care services rendered at a higher rate than that charged to the general public. When submitting those certifications, defendant implicitly was certifying that the rates charged to the general public were the same or greater than the rate sought in the certifications for reimbursement when they were not. Thus, there existed legally sufficient evidence to support larceny by false pretense and offering a false instrument for filing. Finally, we find unpersuasive defendant's contention that the sentence was unduly harsh and excessive or that the amount of restitution was based upon an impermissible or improper extrapolation.

ORDERED that the judgment is affirmed.

CARDONA, P.J., MERCURE, PETERS and MUGGLIN, JJ., concur.

APPENDIX B — ORDER TO SHOW CAUSE OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT DATED AND ENTERED AUGUST 22, 2001

PRESENT: Hon. Edward O. Spain

STATE OF NEW YORK SUPREME COURT
APPELLATE DIVISION THIRD DEPARTMENT

ULSTER HOME CARE, INC., JAMES MAHONEY and DIANE WIEGAND,

Plaintiff-Appellants

against

DENNIS VACCO, in his capacity as Attorney General of the State of New York,

Respondent.

ORDER TO SHOW CAUSE

Upon the annexed Affidavit of Raul A. Tabora, Jr., Esq., dated the 21st day of August, 2001, and upon the Affidavit of James Mahoney, dated the 21st day of August, 2001 and on all pleadings previously had let defendant show cause before this Court on the 27th day of August, 2001 at 10:00 AM., or as soon thereafter as counsel may be heard why an order should not be made staying the decisions and order of Supreme Court dated August 10, 2001 and duly entered on August 16, 2001 pending appeal thereof to the Appellate Division, Third Department, and it is

ORDERED, that, pending the hearing and determination of this motion brought on by this Order to Show Cause, disposition of this Order to Show Cause, defendant be, and

is hereby stayed from taking any actions pursuant to the Order dated August 10, 2001 and entered on August 16, 2001, and it is further

ORDERED that service of a conformed copy of this Order to Show Cause and the papers upon which it is granted by overnight mail upon the office of the Attorney General, on or before August 22, 2001, be deemed sufficient, and it is further

ORDERED that this motion brought on by this Order to Show Cause shall not be orally argued unless counsel are notified to the contrary by the Clerk of the Court.

ENTER: August 22, 2001

s/ Edward O. Spain
Associate Justice Hon. Edward O. Spain
Appellate Division, Third Department

APPENDIX C — DECISION AND ORDER ON MOTION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT DATED, DECIDED AND ENTERED SEPTEMBER 21, 2001

STATE OF NEW YORK
SUPREME COURT - APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Decided and Entered: September 21, 2001

Case # 90178

ULSTER HOME CARE INC. et al.,

Appellants,

v

DENNIS C. VACCO, as Attorney General of the State of New York,

Respondent.

DECISION AND ORDER ON MOTION

Motion for stay pending appeal.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is granted, without costs.

PETERS, J.P., SPAIN, CARPINELLO, ROSE and LAHTINEN, JJ., concur.

ENTER:

s/ Michael J. Novack
Michael J. Novack
Clerk of the Court

APPENDIX D — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, ULSTER COUNTY DATED AUGUST 10, 2001

STATE OF NEW YORK
SUPREME COURT
ULSTER COUNTY

Index No.: 98-1461

ULSTER HOME CARE INC. et al.,

Plaintiffs,

-against-

DENNIS C. VACCO, in his capacity as Attorney General of the State of New York,

Defendant.

Decision & Order

Supreme Court, Ulster County
RJI#55-98-00833
Motion Term

Present: E. Michael Kavanagh, JSC

* * *

Kavanagh, J

Defendant seeks an order of this Court vacating the preliminary injunction entered by Supreme Court (Torraca, J) on June 9, 1998. Plaintiffs oppose the motion.

Plaintiffs commenced this action for a determination that 18 NYCRR 505.14(h)(7)(ii)(a)(1), the Public Charge

Regulation, was unconstitutionally vague on its face and as applied. Plaintiffs sought an injunction stopping the Attorney General from prosecuting plaintiffs or imposing any criminal or civil liability on it based upon that regulation. On June 2, 1998, Supreme Court (Torraca, J) enjoined the Attorney General from enforcing the public charge regulation and from demanding payment therefrom, a decision which was affirmed on appeal (255 AD2d 73). Plaintiffs then moved for summary judgment on their claim that the regulation was unconstitutional, which Supreme Court (Torraca, J) denied. The Appellate Division reversed finding that the Public Charge Regulation was unconstitutionally vague on its face (268 AD2d 59), resulting in a judgment from Supreme Court (Torraca, J) being entered thereupon.

In a decision dated May 10, 2001, The Court of Appeals reversed the Appellate Division's decision and found that the Appellate Division had erred in deciding that the regulation was unconstitutional on its face and that plaintiffs "should have been required to show that the regulation was unconstitutional as applied to them". The Court of Appeals reversed the decision of the Appellate Division and Judgment of Supreme Court therefrom and remitted the matter to Supreme Court for further proceedings. This motion resulted.

The Attorney General argues that the preliminary injunction should be vacated because the Court of Appeals determined that "it was error to enjoin plaintiffs' criminal prosecutions" and that under CPLR 6314, the preliminary injunction should be vacated because the Court of Appeals has "removed from this case the premise on which the injunctive relief was based". In response, plaintiffs argue that there was never an appeal of the order granting the preliminary injunction and the Court of Appeals' decision did not review said order and, therefore, the preliminary injunction is the "law of the case".

Appendix D

It is true that the order granting the preliminary injunction was not appealed. It is also true that the Court of Appeals' decision indicated that "[t]he Appellate Division affirmed the grant of the preliminary injunction and the finding of contempt. This prior order does not necessarily affect the judgment here and thus is not brought up for review". However, the Court does not agree that as a result, the injunction may not be vacated by this Court. CPLR 6314 provides that a defendant who is enjoined by a preliminary injunction may move at any time to vacate or modify the injunction. While the Court of Appeals' decision did not impact the effect of the preliminary injunction, it did not prevent this Court from vacating the injunction pursuant to CPLR 6314.

In fact, it is this Court's view that the Court of Appeals' decision, while it did not itself effect its validity, provides support and guidance for this Court's so doing. After concluding that the Appellate Division erred by finding that the regulation was unconstitutionally vague on its face, it also concluded that plaintiffs must be required to establish that it was unconstitutional as applied to them. The Court found that "it was error [for the Court] to enjoin plaintiffs' criminal prosecutions". The Court's basis for this conclusion was the intended charges against plaintiff were grand larceny and offering false instruments for filing, not challenged regulation. Based upon this finding, as well as the conclusion that the regulation was not unconstitutionally vague, this Court believes that the Court of Appeals has, even if not specifically so stated, attacked the basis upon which the injunction was given. In the face of the Court of Appeals' decision, in addition to this Court's finding that the Attorney General should not have been enjoined from imposing criminal or civil liability against plaintiffs, it is the Court's decision that the preliminary injunction prohibiting same shall be herein vacated in its entirety.

Appendix D

Therefore, it is hereby

ORDERED that the motion to vacate the preliminary injunction entered June 9, 1998 is hereby granted and said preliminary injunction is vacated in its entirety.

This constitutes the Decision and Order of this Court. All papers are being returned to the Attorney General. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provisions of that rule regarding entry, filing and notice of entry.

SO ORDERED!

s/ E. Michael Kavanagh
E. Michael Kavanagh, JSC

Dated: August 10, 2001
Kingston, New York